BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

JOSE M. AYALA)
Claimant)
)
VS.) Docket No. 1,019,020
)
FOODBRANDS SUPPLY CHAIN SRVS.)
Self-Insured Respondent	

ORDER

Claimant requested review of the September 23, 2008 Award by Administrative Law Judge Steven J. Howard. The Board heard oral argument on December 9, 2008.

APPEARANCES

C. Albert Herdoiza of Kansas City, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

Issues

The Administrative Law Judge (ALJ) found claimant sustained a 19 percent permanent partial disability to the left foot.

Claimant requests review of the following: (1) whether the ALJ failed to find that claimant injured his back as a result of an altered gait following his surgery; (2) whether or not there was an agreement with regard to temporary total disability compensation paid; and, (3) payment of unauthorized medical.

Claimant argues that his left foot injury has caused an altered gait and as a result he sustained an injury to his low back and hips.

Respondent argues the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out a summary of evidence and findings of fact that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings in this order. Therefore, the Board adopts the ALJ's summary of evidence and findings of fact as its own as if specifically set forth herein.

It is not disputed that claimant suffered a work-related injury to his foot. The parties disputed whether claimant also suffered permanent injury to his back as a result of an antalgic gait caused by the foot injury.

At regular hearing, claimant gave several different versions of when he started limping. At a subsequent deposition claimant insisted that his antalgic gait started after the last surgery performed by Dr. Greg Horton. And he emphasized that he limped at all times and while at work. Claimant further testified that he complained of back pain and requested treatment. Four of claimant's supervisors testified that they had neither seen claimant limp at work nor had he complained of back pain or requested treatment for his back. Two short surveillance videos of claimant depicted a slow walk but no overt limp.

Dr. Fernando Egea, claimant's medical expert, opined that claimant suffered a permanent injury to his back as a result of limping caused by his foot injury. Dr. Horton, who performed the last surgery on claimant's foot, opined that an antalgic gait cannot cause a permanent back injury. The ALJ referred claimant to Dr. Terrence Pratt for an independent medical examination but curiously admonished the doctor not to provide a causation opinion. Dr. Pratt provided a rating which included a 5 percent functional impairment for his low back complaints. Consequently, the doctor's deposition was taken and the parties questioned the doctor regarding causation for claimant's back impairment.

Based upon hypothetical questions posed by counsel the doctor initially provided equivocal opinions regarding the causation for claimant's back impairment. Dr. Pratt testified that he would expect claimant to have some altered gait after the initial injury in April 2004 and then again after surgery in March 2005. At the time of Dr. Pratt's evaluation, it was noted that claimant's gait pattern was slow with reports of low back pain. Dr. Pratt opined that an altered gait can produce low back pain. But Dr. Pratt testified:

Q. You testified a moment ago that it has been your experience with other patients that an altered gait can lead to the development of low back pain. Do I have that right?

A. That's correct.

Q. Is the gait that you observed Mr. Ayala to walk with when you saw him on examination a gait which you would expect to produce low back pain?

A. No, it was not.1

Moreover, when Dr. Pratt viewed the surveillance video of claimant walking he testified that the gait that he observed would not be expected to produce low back pain. Finally Dr. Pratt testified:

Q. Setting aside all the hypotheticals that have been thrown at you here today and focusing just upon what you reviewed by way of records and your own examination of Mr. Ayala, are you able to state within a reasonable degree of medical probability that his low back pain is the result of the injury suffered in April of 2004, the treatment he received for that or any change in his gait because of it?

A. No.²

Based upon a review of the entire evidentiary record the Board concludes that claimant has failed to meet his burden of proof that he suffered a permanent injury to his low back as a result of his work-related accidental injury. As the ALJ determined, the claimant failed to establish that he limps, or suffers an altered gait which caused, aggravated, accelerated or intensified his back complaints.

Based on the AMA *Guides*³, Dr. Horton rated claimant's left foot at 19 percent. Based on the AMA *Guides*, Dr. Egea rated claimant's amputation of the second toe at the interphalangeal joint at 2 percent to the left lower extremity; left great toe was given a 5 percent to left lower extremity; left third and fourth toes where rated at 4 percent to the left lower extremity due to decrease extension and fixation. Based upon the AMA *Guides*, Dr. Pratt rated claimant's great toe at 2 percent due to diminished extension and for two or more lesser toes with limited extension he assigned a 5 percent impairment of the lower

¹ Pratt Depo. at 24.

² Id. at 61-62.

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

extremity. The total loss of range of motion to the lower extremity is 7 percent. For claimant's distal amputation of the second toe, Dr. Pratt assigned an additional 2 percent impairment of the lower extremity. These lower extremity impairments combine for a total of 9 percent. The ALJ determined that Dr. Horton's rating to the foot was most persuasive, the Board agrees and affirms.

Claimant argues the ALJ should have extended his terminal date in order for him to re-depose Dr. Pratt. This argument is based upon claimant's interpretation of some of Dr. Pratt's comments at his deposition. Claimant argues that Dr. Pratt stated that x-rays of claimant's low back would be determinative of the causation for claimant's low back complaints. But Dr. Pratt simply stated that he needed an accurate history of when claimant's back complaints started and that x-rays would "perhaps" help make a causation determination. But Dr. Pratt further noted if x-rays were taken they would just be part of the information he would consider. The ALJ concluded claimant had not established good cause to extend claimant's terminal dates. The Board agrees. As quoted above, Dr. Pratt did offer a causation opinion based upon the facts and medical records and as he noted, x-rays, while helpful, would not necessarily be determinative. And in any event he concluded that claimant's gait would not cause low back pain.

Finally, at regular hearing the respondent noted that claimant was paid 24 weeks of temporary total disability compensation. The claimant's attorney agreed there was no claim for additional temporary total disability compensation. Consequently, the parties agreed that claimant was entitled to 24 weeks of temporary total disability compensation. Claimant is awarded 24 weeks of temporary total disability compensation at \$390.05 per week, less amounts previously paid.

The Award directed respondent to pay the court reporter fees for the hearings and depositions that comprised the evidentiary record. However, the list failed to include the costs for the Continued Regular hearing on June 12, 2008. Consequently, the Board orders respondent to pay Metropolitan Court Reporters \$319.45 for the Continued Regular Hearing Testimony and affirms the ALJ's Award in all other respects.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Steven J. Howard dated September 23, 2008, is affirmed.

⁴ *Id.* at 52.

⁵ R.H. Trans. at 3-4.

IT IS SO ORDERED.

Dated this 29th day of May 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant Gregory D. Worth, Attorney for Respondent Steven J. Howard, Administrative Law Judge